

VLAB Housing Committee will discuss the following document during the February 4th meeting

To the Members of the Virginia Latino Advisory (VLAB) Housing Sub-Committee:

Through my conversations with the Chair, I have learned that some VLAB members are concerned about reiterating at least some of the recommendations we presented last year. I also understand that at least one of the recommendations I made—one regarding the elimination of attorney's fees recovery in cases arising as unlawful detainers for non-payment of rent—became the subject of outspoken opposition from a landlord lobbying group.

I stand by my recommendation. The award of attorney's fees is generally used as an exception to the American Rule on attorney's fees and is meant as an exceptional remedy most widely used in cases that involve complex legislative schemes. Its purpose is to serve as a deterring punishment when a party demonstrates willful malice or deliberate misconduct.¹ Based on these widely applied standards, the imposition of attorney's fees upon individuals too impoverished to pay their rent is an unnecessarily punitive measure.

Unlawful detainers for the non-payment of rent are straightforward cases, not complex litigation. Landlords need only present evidence that there was a contract establishing how much rent is periodically owed and that a notice to pay or face legal consequences was given. In the typical case, if the tenant failed to pay, there is no defense. No job loss, emergency medical bill, death in the family, abandonment by a spouse, or unexpected car accident can relieve a tenant from the obligation to pay. If the tenant has not paid, they must pay. Judges adjudicating these cases often dispose of them at a first hearing that lasts less than 5 minutes or at a subsequent trial that lasts about 15 minutes.

Moreover, imposition of attorneys' fees upon a person facing homelessness is simply an abomination and an injustice that punishes nothing but poverty. Under the American Rule on attorney's fees, each party must pay for its own legal costs unless the defendant's conduct is so wrongful that it deserves a special punishment to deter its recurrence. It is the epitome of vile and unnecessary punishments to force individuals too impoverished to safeguard a roof over their heads to pay additional costs as deterrence. Payment of attorney's fees cannot possibly serve as an encouragement to obtain employment or professional advancement, to redesign our health care systems as affordable, to the reconstruction of family structures that provide additional, stable incomes, or to the fortuitous find of spare parts for car repairs.

My position notwithstanding, I recognize that I am but one member of a larger body, preoccupied with its legacy and its ability to effect immediate and lasting change for our LatinX communities. Accordingly, while I would prefer that my original recommendation be reiterated, I propose an

¹ Robert Aloysius Hyde & Lisa M. Sharrock, A Decade Down the Road but Still Running Through the Jungle: A Critical Review of Post-Fogerty Fee Awards, 52 U. Kan. L. Rev. 467, 469 (2004)(discussing attorney's fees under the Copyright Act as a deterrent to be considered in the context of the party's financial strength and motivations); Richard W. Murphy, Superbifurcation: Making Room for State Prosecution in the Punitive Damages Process, 76 N.C. L. Rev. 463, 516 (1998)(discussing attorney's fees award in the criminal context as punishment and deterrence); Bailey Kuklin, On the Knowing Inclusion of Unenforceable Contract and Lease Terms, 56 U. Cin. L. Rev. 845, 918 (1988). See Hutto v. Finney, 437 U.S. 678 (1978)(awarding attorney's fees based on party's bad faith); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923)(awarding attorney's fees as punishment and deterrence).

alternative that focuses on curtailing landlord's practice of charging attorney's fees prior to the filing of a summons for unlawful detainer. Below I include my rationale.

The residential landlord-tenant relationship entails an inherently imbalanced distribution of power that may become coercive and detrimental to the tenant absent state intervention. To prevent abuse, state laws throughout the US assign specific responsibilities to landlords and tenants, protect specific rights, and identify available remedies.

Currently, the Virginia Code includes some provisions regarding the recovery of reasonable attorneys' fees by landlords and tenants under certain circumstances, but not others. Provisions allowing the recovery of a tenant's reasonable attorney's fees are invariably predicated upon the filing of a court action for damages or injunctive relief (or for both).² Without explanation, however, the Code does not similarly predicate a landlord's ability to demand the payment of attorney's fees upon the filing of a court action. Instead, Virginia Code § 55.1-1245(H) specifically entitles landlords to recover attorney's fees "regardless of whether a lawsuit is filed or an order is obtained from a court[.]"

There can be no even, fair, or altruistic purpose to the perpetuation of an imbalanced state of the law that demands from tenants court action and the substantive proof of wrongdoing as adjudged by an impartial third party and demands nothing from landlords. It is incumbent upon us as representatives of our LatinX communities to denounce this pernicious practice and legal scheme, because it allows for the capricious inflation of rental amounts owed, which in turn aggravates the disproportionate burden of unlawful detainers actions (as eviction actions are known in Virginia) upon racial and ethnic minorities—such as our LatinX and Hispanic communities.³

We should therefore recommend that the Governor initiate and/or support effort to repeal the language of Virginia Code § 55.1-1245(H) that entitles landlords to recover attorney's fees "regardless of whether a lawsuit is filed or an order is obtained from a court[.]"

² Examples of these provisions—all of which require the filing of a court action—include when a prospective landlord fails to consider an applicant's status as a victim of abuse as a mitigating factor of their low credit score [Va. Code § 55.1-1203(D)] or fails to return certain portions of a refundable application deposit within certain time limitations [Va. Code § 55.1-1203(A)]; when a landlord makes an unlawful entry or otherwise harasses the tenant by unreasonably making repeated demands for entry [Va. Code § 55.1-1210]; when the landlord willfully fails to comply with the Code requirements on deductions from the security deposit and their notification [Va. Code § 55.1-1226(E)]; and when the landlord fails to comply with provisions of the lease or the VRLTA and such failure is material or otherwise represents a serious threat to life, health, or safety of the dwelling occupants [Va. Code § 55.1-1234; *See also* Va. Code § 1241(E) (similar); § 55.1-1239(B) (landlord's wrongful failure to supply essential services); § 1243(A) (unlawful ouster, exclusion, or diminution of services); § 1244(G); § 1245(H)(3)].

³ *See* Deena Greenberg, Carl Gershenson, and Matthew Desmond, *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, available at https://scholar.harvard.edu/files/mdesmond/files/greenberg_et_al_.pdf (last accessed on January 25, 2021); Benjamin F. Teresa, PhD RVA Eviction Lab, *The Geography of Eviction in Richmond: Beyond Poverty*, available at <https://cura.vcu.edu/media/cura/pdfs/cura-documents/GeographiesofEviction.pdf> (last accessed January 25, 2021); Kathryn Howell, PhD, RVA Eviction Lab, *Eviction and Educational Instability in Richmond, Virginia*, available at <https://cura.vcu.edu/media/cura/pdfs/cura-documents/EvictionandEducationalInstabilityinRichmond.pdf> (last accessed January 25, 2021).